# The Right of Retention as a Means of Securing Claims: Structure, Legal Nature and Comparative Legal Analysis with Special Reference to the Theory and Practice of the Republic of Serbia

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# The right of retention as a means of securing claims: structure, legal nature and comparative legal analysis with special reference to the theory and practice of the Republic of Serbia

## Abstract

The right of retention is a complex civil law institute that combines elements of real and obligation law, functioning at the same time as a real means of securing claims and a form of legally permissible self-protection of the creditor. Although it is often applied in everyday legal transactions, this institute in domestic legal doctrine is still assessed as insufficiently normatively rounded, primarily due to fragmentary legislation and limited judicial practice. Such a situation opens up numerous controversial issues regarding its legal nature, scope and limits of application, as well as its relationship to related institutes. The aim of the paper is to systematically examine the concept of the right of retention, the conditions for its establishment, the way of exercising the right of retention, legal effects and the limits of the creditor's responsibility for damage caused to the retained thing, by applying a critical legal and normative analysis. In addition to the analysis of the domestic legal framework and court practice, the work also includes a comparative legal approach, through consideration of solutions developed in certain continental European legal systems, as well as in international and model sources of contract law. In this way, common tendencies are pointed out, but also differences in the normative design and functional understanding of the right of retention. The goal of the work is to offer theoretically grounded and practically applicable interpretations that can contribute to a clearer understanding of this institute and to the improvement of legal certainty in its application, while relying on the experiences of comparative law as a corrective and inspiration for possible normative additions to domestic legislation.

***Keywords:*** right of retention, right of retention, means of securing claims, self-protection of rights, comparative legal analysis.

## Introduction

The right of retention (ius retentionis) in modern legal theory is defined as the authority of the creditor to retain the property of the debtor that is legally located in his country, in order to ensure the fulfillment of the due claim, whereby the return of the property can be withheld until the obligation is fulfilled. In this sense, retention is not exhausted in the factual retention of things, but represents a legally recognized means of creditor protection that simultaneously has the function of real security and permitted self-protection of rights (Pavićević, 2024 and Wiese, 2021). The historical development of the right of retention indicates its complex and gradual genesis. In Roman law, a person who held someone else's thing and invested costs for its maintenance was obliged, when the owner of the thing raised a rei vindicatio, to return the thing to the plaintiff, and initially he did not have any rights that could demand compensation for the value of the costs invested (impensae) (Stanković & Orlić, 2001, pp. 261). The right that the defendant received to retain the plaintiff's case until the expenses incurred were not reimbursed was not a separate institution, but was exercised within the framework of the complaint of fraud (exceptio

doli) (Stanković & Orlić, 2001, pp. 261). Exceptio doli is an objection to an action based on fraud or malicious conduct on the part of the plaintiff. Therefore, as the right of retention is somewhat more recent, its development was slower than other civil law institutes. In modern civil law, the right of retention is still not regulated in a unique and systematic way, but normative fragmentation is expressed. Nevertheless, despite the incomplete legal arrangement, the right of retention is often applied, especially in the case of catering storage contracts. Article 728 of the ZOO (Narodna skupština Republike Srbije, 2020, Art. 728) prescribes that a caterer who receives guests for the night has the right to keep the things that the guests brought until full payment of claims for accommodation and other services), as well as in the case of work contracts, storage contracts, transport contracts and other contractual relationships.

In practice, disputed issues related to the conditions for the creation of the right of retention, its duration and termination, the creditor's responsibility for damage caused to the retained item, as well as the scope of claims that can be secured by this institute, are particularly distinguished. A particularly important question is the dilemma of whether the right of retention can be exercised exclusively for the purpose of collecting a claim arising from a specific retained item or whether it can include earlier, due claims against the same debtor. The absence of clear normative solutions in this regard further contributes to legal uncertainty and opens up space for different, often conflicting interpretations.

Starting from the mentioned problems, the paper aims to, by applying normative, dogmatic and critical legal analysis, provide a systematic presentation of the right of retention as a specific civil law institute that unites elements of real and obligation law, functioning simultaneously as a real means of securing claims and a form of legally permissible self-protection of the creditor. The paper discusses the concept of the right of retention, the conditions for its establishment, the way of exercising the right of retention, its legal effects and limits, as well as the question of the creditor's responsibility for damage caused to the retained item. Special emphasis is placed on the analysis of judicial practice, with the aim of seeing how the courts interpret and apply this institute in specific disputes. Through this methodological approach, the work aims to offer theoretically grounded and practically applicable interpretations that can contribute to a more consistent application of the right of retention and the improvement of legal security in legal transactions.

## The concept and legal nature of the right of retention

The right of retention (ius retentionis) in modern legal theory is not seen as a mere factual retention of someone else's property, but as a legally recognized authority of the creditor to refuse the return of the property that is legally located in his country, in order to ensure the fulfillment of the claim. Its essence is not exhausted in the possession of things, but in the normatively legitimized right of retention that produces certain legal effects towards the debtor, and in certain situations also towards third parties. Pavićević points out that the right of retention has the structure of a real means of security, since it is directly related to the thing and the state over it, but at the same time it differs from classic real rights in that it does not require a formal constitution, entry in public registers or the consent of the debtor. Precisely because of this, retention is described in modern doctrine as a sui generis institute, whose legal nature is determined functionally, not exclusively formally. A similar conclusion is drawn by Wiese, who disputes the traditional dichotomy according to which certain forms of retention are qualified as real and others as obligational rights. According to this understanding, retention can rather be understood as a legally recognized right

of retention, that is, as a special type of legal "retention capacity" (retention capacity), which functions primarily as a defense against the owner's demand for the return of things. In this sense, retention does not necessarily have to be a subjective right in the classic meaning of that term, but a legal tool that allows the creditor to suspend the effect of the debtor's property rights until the obligation is fulfilled (Wiese, 2021).

This understanding of the right of retention has significant consequences for its legal nature. Retention is not based on the purpose of obtaining benefit from the thing, nor for its permanent retention, but exclusively as an instrument of security and pressure on the debtor. Its function is primarily defensive: the creditor uses the right of retention in order to protect himself from the risk of non-fulfilment, and not for the immediate disposal of the thing. Precisely because of this, in theory, retention is often associated with the permitted self-protection of rights, since it allows the creditor to react immediately without prior court intervention (Pavićević, 2024).

The problem of the legal nature of retention comes to the fore especially in situations of competition between several rights of retention. Silink points out that in the absence of clear normative rules on priority, judicial practice often resorts to ad hoc solutions, which can lead to legal uncertainty. This phenomenon additionally confirms that retention cannot be viewed as a static right, but as a dynamic institute whose legal nature depends on the relationship in which it is applied and on the interests it should protect (Silink, 2024).

A special form of retention, which further sheds light on its legal nature, is the attorney's lien in common law systems. As Okosa points out, the attorney's lien allows the legal representative to retain the client's documents or funds in order to collect due professional fees, and this right is based directly on the law and professional rules, and not on a special security agreement. This example clearly shows that retention functions as an institutionalized form of creditor protection, which balances between the need for efficient collection and the limitation of the debtor's absolute right to property (Okosa, 2020).

Based on the above, it can be concluded that the right of retention represents a hybrid institution of civil law, the legal nature of which cannot be unambiguously determined by applying classical categories. Its essence lies in the function it performs: the securing of claims through the retention of things and the temporary limitation of the debtor's property rights, while at the same time respecting the principles of conscientiousness, proportionality and the prohibition of abuse of rights. It is precisely this functional and flexible nature that makes the right of retention one of the most complex, but also the most important institutes of modern obligation law.

**The right of retention in comparative law**

In the continental European legal tradition, the development of the right of retention is closely related to the evolution of the understanding of mutual obligations in contractual relations. Although in Roman law the mutual obligations from the contract were initially viewed as mutually independent, already in the classical period the understanding prevailed that it is contrary to the principle of conscientiousness to demand the fulfillment of an obligation without simultaneously fulfilling one's own. On that basis, the objection of an unfulfilled contract (exceptio non adimpleti contractus) was developed, which in medieval and early modern law served as a foundation for the later development of the right of retention in modern legal systems (Van den Daele, 1968; Ernst, 2000).

In German law, this development culminates in the clear demarcation of the right of retention as an independent institute of obligation law. The right of retention is understood as a procedural and substantive legal defense that allows the debtor to withhold his own action until he receives a counteraction, whereby the court does not reject the claim, but orders the simultaneous performance of obligations *(Zug um Zug).* This approach has been elaborated in detail in systematic commentaries on German civil law, especially in relation to the general right of retention and reciprocal contracts (Gröschler, 2007; Pennitz, 2007). The German model is particularly significant because it normatively includes situations in which the debtor must fulfill the obligation before the creditor, but is still granted the right to withhold fulfillment if it subsequently becomes apparent that the countermeasure is threatened, which connects the right of retention with the so-called by the defense of uncertainty.

A similar, but narrower approach is present in Austrian law, where the right of retention is traditionally linked to the retention of things for the purpose of compensation for costs or damages, with an emphasis on the protection of the conscientious holder. The Austrian model confirms the continental tendency to limit the right of retention by the requirement of a connection between the claim and the thing, but at the same time recognizes the possibility of its application in situations where the balance of contractual obligations is subsequently disturbed due to the deterioration of the property position of the other party, which corresponds to general theoretical statements about the function of retention in reciprocal obligation relations.

Contrary to the systematic German and relatively restrictive Austrian approach, French law maintains a fragmentary model. The right of retention does not develop as a general institute, but is recognized in precisely defined situations and always under the condition of the existence of a direct connection between the claim and the thing. However, in French law there is also the idea that it is against the principle of conscientiousness to demand fulfillment without simultaneously fulfilling one's own obligation, which confirms the common Roman-doctrinal origin of this institute and its functional connection with the complaint of unfulfilled contract (Ernst, 2000).

A special and doctrinally extremely significant example within continental Europe is represented by Portuguese law, which develops the right of retention (direito de retenção) as a strong real means of security, even in relation to a mortgage. Portuguese jurisprudence, consolidated through the decision of the Supreme Court, confirmed that the right of retention on real estate can have priority over a previously registered mortgage, but only with the cumulative fulfillment of strictly defined conditions. As Shearman de Macedo and Rogado point out, this solution is based on normative changes to the Portuguese Civil Code, which extended the right of retention to protect the buyer-consumer from the pre-contract for the sale of real estate, especially when it comes to residential buildings (Shearman de Macedo & Rogado, 2014). The Portuguese model thus introduces a pronounced social protection component into the retention institute, starting from the idea that professional mortgage creditors, like banks, have significantly greater capacities for risk assessment and management compared to consumers.

These tendencies are not limited exclusively to national legal systems, but are also reflected in international uniform law. The United Nations Convention on the International Sale of Goods (CISG) does not recognize a general right of retention, but recognizes the right to suspend performance in situations where countermeasures are threatened, as well as special retention rights related to the costs of storing goods. This approach is analyzed in detail in the doctrine that considers the possibility of the existence of

unwritten retention rights and their connection with the general principles of the CISG (Kern, 2000; Witz, 2003; Hartmann, 2006; Mohs, 2010; Fountoulakis, 2010).

A similar functional approach is taken by the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Trade Agreements, as well as the Draft Common Framework of Reference (DCFR). These sources start from the idea of simultaneous performance of mutual obligations and recognize the right of retention as a corrective in case of non-fulfilment or serious threat of non-fulfilment, emphasizing the criteria of reasonableness regarding the scope and duration of that right (Cauffman, 2008).

All of the above shows that in modern European and international law, the right of retention does not develop as a strictly formalized institution, but as a flexible mechanism for protecting the contractual balance. Although the normative solutions differ, the common denominator is the effort to prevent dishonest behavior and ensure the simultaneity of actions, which confirms the right of retention as one of the key instruments of fairness in contractual relationships.

**The right of retention in theory and practice of the Republic of Serbia**

The right of retention, that is, the right of retention, is conceptually defined in Article 286, paragraph 1 of the Law on Obligations from 1978. The law stipulates that the creditor of a due claim in whose hands some of the debtor's property is located has the right to keep it until the claim is paid. If the debtor becomes unable to pay, the creditor can exercise the right of retention even though his claim is not yet due (Narodna skupština, 1978, Art. 286). The application of the right of retention is possible both in civil and economic relations (Bukljaš, 1968, pp. 119). One of the key conditions for the emergence of the right of retention is that the creditor's claim is due. When the debtor settles his due obligation, the creditor is obliged to return the withheld thing to him. The maturity of the claim is considered to be the moment when the debtor needs to fulfill his obligation, that is, the moment when the creditor acquires the right to demand the fulfillment of the obligation. Only from that moment does the creditor have the right to retain the debtor's property, which is the first and basic condition for the emergence of the right of retention. However, as with most legal institutes, there is an exception to this rule. Article 286, paragraph 2 of the ZOO stipulates that, if the debtor becomes unable to pay, the creditor can exercise the right of retention even if his claim is not yet due. This legal solution is logical and justified, because otherwise the creditor would be put in a disadvantageous position: he would be obliged to return the thing to the debtor, although it is clear that due to the debtor's insolvency there is a real danger that he will never be able to collect his claim. Therefore, the legislator justifiably prioritizes creditor protection in situations of increased risk.

The right of retention arises primarily on the basis of the law, and much less often on the basis of a contract. According to the ZOO, the right of retention includes two basic powers: the right to retain the debtor's property and the right to charge the creditor, under certain conditions, from the value of the retained property (Stanković & Orlić, 2001, pp. 261). Thus, retention acquires a double function — preventive and ensuring. The specificity of the right of retention is also reflected in its accessory nature, which means that the retention is always related to a specific, individually determined and due claim. It does not exist independently, but follows the main obligation. The right of retention is the right to keep, not the right to dispose of things. It is indivisible. Therefore, the creditor cannot alienate the retained thing, nor use it beyond the framework necessary for its preservation. Retention is primarily a means of

pressuring the debtor to fulfill his obligation. It is also a real means of security, because it is related to the state's property and not to the person of the creditor, which distinguishes it from personal means of security such as surety (Babić, 2008, pp. 221). The subject of retention can be all movable things that can be traded, money, and even certain categories of real estate. However, with real estate there is a significant specificity: the creditor cannot be settled from the value of the retained real estate, but has the exclusive authority to retain it until the claim is paid (Radulović, 2020, pp. 176). Furthermore, the creditor cannot keep the debtor's power of attorney, documents, identification or other things that by their nature cannot be put up for sale (Stanković & Orlić 1982, pp. 392). Also, the right of retention cannot be acquired even though the debtor's thing is in the hands of the creditor in the following cases: if the thing left the debtor's state against his will, if the thing was handed over to the creditor exclusively for safekeeping, as well as when the thing was handed over to a servant (Stanković & Orlić, 2001, pp. 264).

Precisely because of the wide use of retention in everyday obligation relationships and fragmentary normative regulation, numerous disputed issues arise in practice. Although the right of retention is established in the law, its application requires clear judicial interpretations and continuous theoretical processing in order to ensure consistency, legal certainty and protection of both sides of the obligation relationship.

In relation to other means of security, the advantages of the right of retention are primarily reflected in its simplicity regarding the constitution of the right of retention. No special form or registration in the public register is required for the creation of the right of retention, which significantly distinguishes it from a pledge on movable property or a mortgage on immovable property. The right of retention arises as soon as a certain thing of the debtor is in the hands of the creditor. It is this immediacy and "informality" that make retention a very effective, fast and available means of security in everyday legal relations. The right of retention is a security instrument that is based without registration costs, without hiring a public notary and without the need for a special contract. Therefore, it is particularly suitable for craftsmen, hoteliers, transporters, storekeepers and other persons who come into contact with other people's belongings in their regular activities.

Understanding the shortcomings of the institute of the right of retention is of key importance for its further improvement. The main disadvantage of retention lies in the limited scope of the creditor's authority. Although he has the right to retain the thing, he does not have the right to automatically collect from it without court proceedings or the consent of the debtor. Thus, part of the efficiency of the institute is lost, especially in comparison with lien law, where the possibility of out-of-court sales is much wider. We believe that introducing the possibility of out-of-court sale of retention items, under controlled conditions, should be considered, in order to achieve a balance between the protection of the debtor and the effectiveness of security. The out-of-court sale of retention items could be realized through an auction sale or sale by direct negotiation. Such a way of settlement could be conditioned by a mandatory prior address to the debtor, with the aim of enabling him to participate in the sale procedure, since it is also in his interest to sell the subject of retention, if the sale takes place, at the highest possible price. In this way, greater transparency of the procedure and protection of the interests of both parties would be ensured, because the remaining amount realized by the sale, after the settlement of the creditor's claim, undisputedly belongs to the debtor. Another disadvantage is related to the duration of retention. It exists only while the thing is in the creditor's state. Every person who exercises factual authority over a thing has a state. If the

thing, voluntarily or forcibly, is returned to the debtor, the right of retention ceases. This limits the duration of retention and in some cases reduces its practical value.

That the state of the thing is a key condition for the emergence of the right of retention is evidenced by the (Decision, PARS, Pž 2822/2021) which says: "Retention enjoys state protection, which further means that the person who pleads for the title of retainer is obliged to prove that he has acquired that title, and in order to acquire that title it is necessary that he used the right of retention on things that were in his country." Property ownership is a condition without which retention cannot be based." From the explanation of the decision in question:..,, The second-instance court does not accept the expressed legal opinion of the first-instance court. By provision of Art. 450th century 1 of the Law on Civil Procedure, it is prescribed that the discussion of the claim for interference with the state is limited only to discussing and proving the fact of the last state of the state and the resulting interference, and that the discussion of the right to the state, the legal basis, the conscientiousness of the state or requests for compensation is excluded. According to the provisions of Art. 70 of the Law on the Basics of Property Relations, any person who directly exercises de facto authority over things (immediate ownership) has ownership of property, while according to the provisions of para. 2. State property is also owned by a person who exercises de facto authority over the property through another person to whom, on the basis of a usufruct, agreement on the use of an apartment, lease, custody, service or other legal business, the property was transferred to the immediate state (intermediate state).

Therefore, the retention enjoys the state protection, which further means that the person who pleads for the title of retainer must prove that he has acquired that title, and in order to acquire that title, it is necessary that he used the right of retention on things that were in his country. Possession of property is a condition without which retention cannot be based. In the specific case, the first-instance court itself determines that the direct and indirect holder was the defendant, not the plaintiff, and then erroneously finds that by expressing the intention to retain the thing, without it having previously left the defendant's state, he acquired the status of retainer and, in connection with that, the right to state protection. In this sense, the statements from the explanation of the challenged decision that the defendant did not demand that the matter be returned to him are without effect. This is because, according to the factual determination, he did not lose the property, nor did he lose the authority to access the property, he had the keys, which indicates that he did not lose the property, nor did the plaintiff acquire it."

Decision No. Už-4793/2016 of the Constitutional Court dated February 8, 2018 is also impressive it says that there is no right of retention due to the negligence of the holder of the thing. "When the holder did not check the land registry status before concluding the purchase contract and when he started adaptation works on the real estate after learning that the owner disputed the registration of the property rights of his seller, which is why he filed a criminal complaint against several persons for fraud, his state is negligent, because he had reason to doubt the validity of the legal transaction on the basis of which he entered the state. With the right of retention, the conscientiousness of the owner who requests the return of the thing from the holder does not affect the exercise of this right."

Namely, bearing in mind that the creditor does not have the right to keep things of special properties, as well as things that have been handed over to him exclusively for safekeeping or service, in order not to fraudulently acquire grounds for collection from those things, it is clear that this rule has a preventive and protective function. It prevents abuses of the retention institute and preserves trust in bond

relationships, because the opposite solution would allow the creditor, using a specific legal position, to unjustifiably ensure the collection of claims to the detriment of the debtor. However, despite these limitations, a relevant and disputed question is justified in theory and practice: can the creditor retain the debtor's property solely for the purpose of collecting a more recently due debt, i.e. a claim that is directly related to that property, or can the right of retention include older, previously due claims that did not arise due to the retained property? This question is of particular importance, because it concerns the scope of the right of retention and its function as a means of security, but also the balance of interests between the creditor and the debtor. The answer to this question depends on whether the retention will be interpreted restrictively, as strictly related to the specific claim arising in connection with the retained item, or more broadly, as an instrument that allows the creditor to ensure the payment of all due claims against the debtor, provided that the legal conditions for exercising the right of retention are met.

We are of the opinion that the creditor has the right to collect earlier claims, as long as they are due, as long as there is a basic condition of retention — the state of things and that the state was not established against the will of the debtor in the sense that it was acquired fraudulently. The conditions must be met cumulatively. In case the state was acquired fraudulently, then it would not have the right to keep the thing and collect the earlier due claims. The law does not limit retention only to claims arising from a specific matter, so such a limitation would be artificial and against the logic of the institute. As the requirement for retention is that the claim is due, it is clear that earlier claims meet that criterion.

Another significant disadvantage of the retention institute is reflected in the unequal position of debtors. The debtor is actually in a weaker negotiating position, because the creditor can easily use the holding of things as a means of conditioning. In practice, the creditor sometimes unjustifiably increases the amount of the claim, refuses to return the item, or prevents the debtor from using an item that is necessary for the activity (eg a vehicle needed for transporting goods). Such a situation creates additional costs and disturbs the balance of the obligation relationship.

On the basis of Article 76 of the Law on the Fundamentals of Property Relations, the holder has the right to self-help against the person who disturbs him in the state without authorization or whose state has been taken away from him, provided that the danger is immediate, that self-help is necessary and that the method of its execution corresponds to the circumstances in which the danger arose. Permitted self-help, in the sense of Article 162 of the ZOO, includes the right of every person to remove a violation of rights when there is an immediate threat of danger and when such protection is necessary, whereby the method of removing the violation must be appropriate to the circumstances in which the danger arises. Therefore, self-defense is allowed only exceptionally and in situations where the violation of rights must be prevented without delay. Moreover, today's modern legal order excludes self-help and requires individuals to realize their rights through the courts (Stojanović & Petrović, 1990, pp. 347).

The institute of the right of retention is specific precisely because it connects the elements of real and obligational law, creating a protection mechanism that is on the border between permitted self-protection and self-government, as evidenced by the Judgment of the Supreme Court of Cassation, Rev 6417/2021 of May 25, 2022, from the explanation: ,,...Starting from the established factual situation, the lower courts, by applying Article 286, paragraph 1 and 154, paragraph 1 of the Law on Obligations and the burden of proving a causal connection between the action of the defendant and the resulting material damage, rejected the claim because the plaintiff did not prove that he suffered the damage through the

fault of the defendant. Namely, they concluded that the defendant's act of changing the lock on the leased business premises is a manifestation (conclusive action) of his unilateral cancellation of the lease agreement provided for in the provision thereof in this case of non-payment of rent based on Articles 582 and 584 of the ZOO, using his right as a lessor. Since that action is not illegal, and on that day there was his due claim of 14,400 euros based on unpaid rents from the plaintiff, they assessed that in this particular case the conditions of the right of retention - retention from Article 286, paragraph 1 of the ZOO, which provision stipulates the right of a creditor of a due claim in whose hands some of the debtor's property is to retain it until the claim is paid, were met. At the same time, the second-instance court found that, regardless of the date of finality of the aforementioned judgment, the defendant's claims were then 15.07.2011. was due due to non-payment of rent for the time period starting from 01.04.2010. year. When determining that the plaintiff did not overhaul the machines in question in the twelfth year, which represents 80% of their working life, the lower courts judged that the mere fact that they lost value due to standing does not lead to the conclusion that due to the retention of the machines by the defendant, there was damage to the plaintiff's property. They also concluded by applying the rule on the burden of proof from Article 231, paragraph 2 of the Civil Code that the plaintiff did not prove the damage suffered in the name of lost profit, especially when it is taken into account that he was operating with losses from 2009 onwards. Retention is a means of legal self-protection of rights and permitted self-help based on Articles 286, paragraph 1 and 162 of the ZOO. The provision of Article 287 of the same law, which the auditor unfoundedly refers to, excludes the right of retention if the debtor demands the return of a thing that left his country against his will or when he handed it over to the creditor for safekeeping or service. However, in this particular case, for all the reasons already mentioned, the conditions for the application of this exception, which would deny the defendant the right of retention, were not met. The auditor unfoundedly attacks the contested decision and for damages in the form of lost profits because it was properly adopted by applying the rules on the burden of proof from Article 231, paragraph 2 of the Civil Code. With the remaining audit allegations, in which he disputes the established working life of the disputed machines and points out that the defendant transferred these machines unprofessionally and stored them in an inadequate hall, which led to the occurrence of damage, the plaintiff actually disputes the established factual situation as incomplete and incorrectly determined, but this cannot be a reason for declaring an audit based on Article 407, paragraph 2 of the ZPP."

When someone acts in the case of permitted self-help and thereby causes damage to the person who caused the need for self-help, he is not obliged to compensate it because retention is a means of legal self-protection of the right and permitted self-help (Judgment, VSRS, Prev. 406/2005).

The right of retention is also a means of defense of the creditor in a dispute in which the debtor demands the return of the item (Stanković & Orlić, 2001, pp. 261). It is about the so-called objection of retention, which the creditor can point out when the debtor demands the return of things, but has not settled the due obligation. As the duration of the retention is not time-limited, it means that the creditor can keep the thing until the debtor fulfills his obligation. Namely, the creditor's authority to settle from the value of the retained item is one of his key rights and is to a significant extent similar to the position of the lien creditor. A creditor holding a thing by retention has the right to collect from its value in the manner prescribed for lien creditors, but is obliged to inform the debtor of his intention in a timely manner before undertaking settlement measures (Narodna skupština, 2020, Art. 286). The reason for this is based on

the fact that the creditor's claim is already due, so the notice is seen as the last warning to the debtor before the start of forced collection (Stanković & Orlić, 2001, pp. 267).

In the context of settlement methods, the procedure for civil and economic relations differs in terms of efficiency. In civil disputes, the creditor must request a court decision allowing the sale of the item, either through a public sale or at the current market price. On the contrary, in economic relations, the creditor can start a public sale already after eight days from the day of sending the warning to the debtor, i.e. sell the thing at the market or stock exchange price, with the obligation to notify the debtor in advance. This solution is much more effective and achieves the basic purpose of the retention institute as a means of self-protection.

Bearing in mind that in practice creditors are often settled out of court, it is justified to ask whether the more favorable and faster regime, characteristic of commercial law, should be extended to civil relations as well. In situations where there is a lack of a fast judicial mechanism or a precise normative arrangement, the right of retention loses its purpose and can easily turn into impermissible self-government. That is why it is necessary to improve the normative framework of retention, especially in the part related to the method of settling the debtor and the protection of the rights of all participants. Furthermore, as a very important and theoretically complex topic, the relationship between the right of retention and compensation for damages is imposed. Retention as an institution of self-protection can simultaneously represent the potential liability of the creditor for the resulting damage.

A party in an obligation relationship is obliged to act with the care that is required in legal transactions in the appropriate type of obligation relationship (the care of a good businessman, i.e. the care of a good household member (Narodna skupšina, 2020, Art. 18). Violation of this obligation leads to the liability of the creditor. or dangerous conditions, in case of insufficient control and supervision over the thing, as well as in the case of acting contrary to the debtor's explicit instructions, etc. Liability may also arise when the creditor exceeds the limits of the necessary actions for the preservation of the thing, or when he fails to take the elementary protection measures that can be expected.

In this sense, in the case where the creditor of a due claim, in whose hands some of the debtor's property is located, keeps the thing until the claim is paid, there is no place for establishing the creditor's liability towards the debtor as in the sense of ordinary damages, nor due to the lost profit that the debtor would have made by using the retained items (Judgment, ASNS, Gž 1620/2021). Also, compensation for lost profit due to retention in case of non-payment of rent (Narodna skupština, 2020, Art. 154, 155, 189, 286 and 584) in a situation where the lessor retained the tenant's belongings due to non-payment of rent by the tenant, i.e. exercised the right of retention, the tenant cannot claim lost profit, when it was determined that the tenant, according to the final accounts, operated at a loss in the years preceding the closing of the business premises in question, according to which he could not even suffer damage in the form of lost profit (Judgment, ASNS, Gž 1620/2021).

Therefore, the creditor will be liable for real damage, lost profit, and even for non-material damage in case of unjustified retention of things, that is, when he uses retention beyond the limits of his authority. Such situations arise e.g. when the creditor keeps the thing even though the claim is not due, when he refuses to return the thing even though the debt has been fully settled, when he abuses the position of the debtor in order to obtain additional benefit, when he increases the amount of the claim or makes the exercise of the right conditional on unfounded demands, as well as when he uses the thing without the

debtor's approval or contrary to its nature and purpose. In all these cases, as well as in other similar ones mentioned, the creditor exceeds the limits of self-protection permitted by law, and his actions pass into self-government, which necessarily activates the rules of responsibility for damage. Therefore, the debtor can demand compensation for actual damages, lost profits, and even compensation for non-material damages in exceptional situations. Therefore, the retention of things must be aligned with the principles of conscientiousness and honesty.

## Conclusion

The right of retention, although at first glance it seems like a simple civil law institution, in essence it is not. It is a very complex institute that requires special, comprehensive and precise legal regulation. Its application in legal traffic is frequent and almost everyday, especially with storage contracts, hotel management contracts, storage contracts, labor contracts, transport contracts and similar contractual relationships. Precisely because of its frequent application, the need for its more detailed and systematic normative regulation becomes even more pronounced.

What is necessary, first of all, is to clearly and unambiguously regulate the issue of collection, that is, settlement of the creditor from the retained debtor's property. In this regard, legal theory and practice should consider the solutions that exist in commercial law relations and prescribe a similar, perhaps more efficient model of settlement of claims from retained debtor's property for civil law relations as well. Long-term settlement of the creditor exclusively through the courts often leads to the loss of the purpose of the retention institute itself, whose basic function is quick and effective pressure on the debtor to fulfill the obligation. This is particularly evident considering that the right of retention does not require a special form, nor registration in public or central registers, but arises directly on the basis of the law or contract.

The right of retention is at the same time an institute of real law and obligation law, a real means of securing claims, but also a form of legal self-protection of rights, i.e. the creditor's allowed self-help. Its specificity is reflected precisely in the fact that this institute, figuratively speaking, "floats" between the aforementioned legal categories. It has points of contact with numerous related institutes, such as the pledge, but it is clearly different from them in its origin, effect and legal nature.

Comparative legal analysis shows that the right of retention in modern legal systems does not develop as a strictly unique and formally codified institute, but as a functional mechanism for preserving contractual balance and protecting creditors in situations of mutual obligation disruption. Although the normative solutions differ - from the systematically regulated German model, through the more restrictive and fragmentary approach present in French law, to specific solutions in Portuguese law that emphasize consumer protection - the common denominator is the effort to prevent unfair behavior and ensure the simultaneity of actions. International and model sources of contract law further confirm this tendency, favoring flexible rules on retention and suspension of performance depending on the specific circumstances of the case. Such a comparative legal context indicates that the right of retention should be viewed not only as a technical means of security, but as an instrument of fairness and correction of contractual relations, which can serve as an important guideline for its future normative improvement in domestic law. Fragmentary and insufficiently precise legal regulations of this institute can lead to inconsistency of court decisions and uneven application of the right of retention in practice. Such a situation

creates legal uncertainty, both for creditors and debtors, but also complicates the work of the courts. In order to facilitate its application and ensure greater legal certainty in legal traffic, both for the parties and for court practice, we believe that it would be expedient to pass a special law that would detail and systematically regulate the right of retention and all disputed issues that arise in practice.

Such a normative solution should, first of all, precisely regulate the rights and obligations of the creditor and the debtor, the question of maturity of claims, the range of claims from which the creditor can be satisfied (including a clear determination of whether and to what extent the retention includes older claims), the rules on retention of things, the time frame of retention for the protection of the debtor, the conditions and method of returning things, as well as the conditions for responsibility for damage and other relevant issues.

With a clear and unambiguous normative regulation of this matter, the legal system would become fairer, more functional and more predictable, and at the same time, the confidence of participants in legal transactions would be strengthened and the rights of persons whose rights are threatened or violated would be more effectively protected.

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# Pravo retencije kao sredstvo obezbeđenja potraživanja: struktura, pravna priroda i uporednopravna analiza sa posebnim osvrtom na teoriju i praksu R. Srbije

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## Sažetak

Pravo retencije predstavlja složen građanskopravni institut koji objedinjuje elemente stvarnog i obligacionog prava, funkcionišući istovremeno kao realno sredstvo obezbeđenja potraživanja i oblik zakonski dopuštene samozaštite poverioca. Iako se često primenjuje u svakodnevnom pravnom prometu, ovaj institut u domaćoj pravnoj doktrini i dalje se ocenjuje kao nedovoljno normativno zaokružen, pre svega zbog fragmentarne zakonske regulative i ograničeno razvijene sudske prakse. Takvo stanje otvara brojna sporna pitanja u pogledu njegove pravne prirode, obima i granica primene, kao i odnosa prema srodnim institutima. Rad ima za cilj da, primenom kritičkopravne i normativne analize, sistematično ispita pojam prava retencije, uslove za njegovo zasnivanje, način vršenja prava zadržavanja, pravna dejstva i granice odgovornosti poverioca za štetu nastalu na zadržanoj stvari. Pored analize domaćeg pravnog okvira i sudske prakse, rad obuhvata i uporednopravni pristup, kroz razmatranje rešenja razvijenih u pojedinim kontinentalnoevropskim pravnim sistemima, kao i u međunarodnim i modelnim izvorima ugovornog prava. Na taj način se ukazuje na zajedničke tendencije, ali i na razlike u normativnom oblikovanju i funkcionalnom razumevanju prava retencije. Cilj rada je da ponudi teorijski utemeljena i praktično primenljiva tumačenja koja mogu doprineti jasnijem razumevanju ovog instituta i unapređenju pravne sigurnosti u njegovoj primeni, uz oslanjanje na iskustva uporednog prava kao korektiv i inspiraciju za moguće normativne dopune domaćeg zakonodavstva.

***Ključne reči:*** pravo retencije, pravo zadržavanja, sredstvo obezbeđenja potraživanja, samozaštita prava, uporednopravna analiza.